

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**MICHAEL CETTA, INC. d/b/a SPARKS
RESTAURANT**

and

**Case 02-CA-142626
02-CA-144852**

**UNITED FOOD AND COMMERCIAL
WORKERS LOCAL 342**

ORDER¹

The Respondent's request for special permission to appeal from Administrative Law Judge Kenneth W. Chu's April 20, 2021 Order directing the compliance hearing to be conducted by videoconference is granted. On the merits, the appeal is denied.

In requesting an in-person hearing, the Respondent (i) argues that conducting a virtual hearing would infringe upon the Respondent's due process rights given the proceeding's complexity; (ii) asks that the Board reevaluate the compelling circumstances for holding this hearing remotely; and (iii) claims that the Board's "Courtroom Deputy" program creates an appearance of impropriety. We reject each of those claims.

The Board has found that the ongoing Covid-19 pandemic establishes good cause based on compelling circumstances for taking video testimony under Section 102.35(c). *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1 (2020); *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1 (2020). Moreover, we have found that because Section 102.35(c) pertains to hearings in which a single witness testifies via video conference in an otherwise in-person hearing, the strictures of that Section are informative but not controlling when a hearing is

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

conducted entirely by videoconference. *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 1; *Morrison Healthcare*, 369 NLRB No. 76, slip op. at 1, fn. 2. A video hearing can also provide for the observation of witnesses for the purpose of credibility, as well as other due process concerns. *EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 1, fn. 1 (2015), enfd. 673 Fed. Appx. 1 (D.C. Cir. 2017).

We find that the judge did not abuse his discretion in ordering a video hearing here. The Respondent emphasizes the complexity and number of exhibits and witnesses involved in this case and raises concerns about the technological sophistication of the witnesses. But the Board has already addressed these concerns – deferring to the competent discretion of the trial judge, who is best positioned to determine whether a case is well-suited to a virtual setting. As the Board held in *William Beaumont Hospital*:

[T]he trial judge has the discretion to determine whether the case is too complex; cumbersome; or witness-, document-, and fact-heavy to be heard remotely. And, to the extent the Respondent has a concrete, not speculative, concern that cannot be ameliorated by the videoconferencing technology, or other pretrial accommodations or stipulations among the parties, the Respondent may raise it to the trial judge in the first instance, or on exceptions to the Board pursuant to Section 102.46 of the Rules and Regulations, in the event the Respondent receives an adverse ruling.

We are not persuaded by the Respondent’s attempt to distinguish prior Board cases sanctioning remote hearings, such as *William Beaumont Hospital* and *XPO Cartage*, 370 NLRB No.10 (2020). We continue to find those cases sound where, as here, the Respondent’s due process concerns are speculative and premature.

The Respondent also asks the Board to reevaluate the state of the Covid-19 pandemic and whether it still constitutes good cause based on compelling circumstances to justify holding remote hearings. We believe that it does. We acknowledge the evolving state of the pandemic, with vaccinations becoming more widespread and some jurisdictions returning to in-person

hearings and trials. Nevertheless, we cannot say that conditions have improved so much, whether in New York or elsewhere, as to *mandate* a return to in-person hearings. Based on current conditions, Judge Chu has not abused his discretion in relying on the ongoing pandemic as a compelling circumstance necessitating a remote hearing, particularly in this witness-heavy case. See *William Beaumont Hospital*, 370 NLRB No. 9, slip op. at 2 (“[E]ven if the Board has conducted some of its business in-person since the *Morrison* decision issued, that does not invalidate the judge’s conclusions about holding an in-person hearing in this witness-heavy case.”).

Finally, we reject the Respondent’s challenge to the Board’s “Courtroom Deputy” program. Under that program, the trial judge can elect to have a Board-side attorney or employee assist in the technological aspects of the hearing, such as operating the breakout and waiting rooms, screen-sharing exhibits, or troubleshooting technological issues.² The Respondent claims that the program, on its face, presents an appearance of impropriety because the attorneys acting as Courtroom Deputies work with those prosecuting the case.³ The Respondent, however, misunderstands the Courtroom Deputy’s role in the hearing and overlooks the agency’s bifurcation of its prosecutorial and adjudicatory functions. See *NLRB v. United Food & Com. Workers Union, Loc. 23*, 484 U.S. 112, 117-18 (1987). The Courtroom Deputy (a Headquarters, Board-side employee) neither works with, nor assists Counsel for the Acting General Counsel (a Regional Office, GC-side employee) in prosecuting the case. Rather, the

² Neither party states whether the judge plans to use a Courtroom Deputy in this case.

³ The Respondent argues that the Courtroom Deputy program runs afoul of New York Code of Professional Responsibility, Canon 9, which is no longer in effect. We acknowledge, however, that Board attorneys and employees must abide by relevant ethics laws, including, but not limited to, those in the Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635.101 et seq.

Courtroom Deputy’s role is even-handed and administrative – ensuring that the hearing runs smoothly, allowing the judge to focus on the witness testifying, and mitigating technological glitches, including those that the Respondent speculates will arise during this hearing. Crucially, as Judge Chu’s pre-trial order makes clear, “[t]he Courtroom Deputy will be recused from working on this case following the hearing.” Recusal adequately addresses any concern that the Courtroom Deputy, after participating in the public hearing, would lack impartiality in later work on the case on the adjudicatory side of the agency. Cf. 5 C.F.R. § 2635.502(a) (recusal appropriate “where the employee determines that the circumstances would cause a reasonable person with knowledge of the relevant facts to question his impartiality in the matter”).

Under these circumstances, we find that the Respondent has failed to demonstrate that the judge abused his discretion.

Dated, Washington, D.C. May 14, 2021.

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| LAUREN McFERRAN, | CHAIRMAN |
| MARVIN E. KAPLAN, | MEMBER |
| WILLIAM J. EMANUEL, | MEMBER |